UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

GARY G. FRANKS	)	
v.	)	DOCKET NUMBER DA07528210002
DEPARTMENT OF THE AIR FORCE	)	

OPINION AND ORDER

The agency has petitioned for review of an initial decision reversing appellant's removal for being drunk or impaired by intoxicants on Government premises.

Based on the record, including a hearing, the presiding official found that appellant, while on approved annual leave, was drunk or impaired by intoxicants, as charged, when he was apprehended by Security Police at Tinker Air Force Base, where he was employed as an Electronics Mechanic. Appellant's past disciplinary record, also considered by the agency in assessing the penalty of removal, consisted of a reprimand and a three day suspension, which the appellant had stipulated as correct. The presiding official found, however, that a nexus had not been established between appellant's off-duty misconduct and the efficiency of the service. The presiding official, therefore, did not sustain the agency's action in removing appellant.

The agency contends that the presiding official, inter alia, misapplied the Board's decision in Merritt v. Department of Justice, 6 MSPB 493 (1981), as well as a number of others also cited in the initial decision on the issue of nexus in off-duty misconduct cases. The agency argues that these cases are significantly distinguishable from appellant's case. Review is hereby GRANTED under 5 U.S.C. 7701(e)(1).

An agency may take a removal action against a federal employee for misconduct only for such cause as will promote the efficiency of the service. 5 U.S.C. Chapter 75. A nexus determination must be based on evidence linking that employee's off-duty misconduct with the efficiency of the service or, in certain egregious circumstances, on a presumption of nexus which may arise from the nature and gravity of the misconduct. That presumption may be overcome by evidence showing an absence of adverse effect on service efficiency, in which case the agency may no longer rely solely on the presumption but must present evidence to carry its burden of proving nexus. Merritt at 30, supra.

In a similar case, also involving the off-duty misconduct of an employee at Tinker Air Force Base, the Board applied Merritt and sustained the removal. Venson v. Department of the Air Force, MSPB Docket No. DA07528010279 (February 23, 1982), aff'd, No. 18-82, slip op. (Fed. Cir. January 4, 1983). In Venson, supra, the employee was removed on charges involving his being under the influence of intoxicants, inflicting bodily harm to NCO Club patrons, and the use of abusive and offensive language to Air Police authorities. The Board concluded that nexus was proven because, although the appellant was off-duty, the incident took place on the premises of the employer, involved the disruption of functions which were sponsored by the employer, and resulted in the use of agency personnel for the purpose of dealing with appellant's conduct. The removal action, therefore, was taken for such cause as will promote the efficiency of the service.

Similarly, nexus was proven in the instant case, although no element of inflicting bodily harm is present. The incident in this case took place on the premises of the employer, presented a possible danger to appellant and others, and involved the use of agency personnel for the purpose of dealing with appellant's conduct.

The appellant, who was intoxicated at the time, staggering at or near the sidewalk, adjacent to a b street, was apprehended by the Security Police and transported to the Police Headquarters on Base. His supervisor was called to the Police Headquarters to assist with the processing. Although several field sobriety tests were conducted before appellant was apprehended and taken to Police Headquarters, he refused to take any alcohol or drug detection tests while he was in custody. Appellant was released to his father after approximately three hours.

The agency, in assessing the penalty of removal, took into consideration the current sustained charge and the two cited prior disciplinary actions, both involving unauthorized absences. Further, after the incident leading to the current charge, but before removal, appellant was offered counselling services, and the opportunity to enroll in a Chemical Awareness Seminar or to enter a Recovery Program. Appellant, however, stated that he would not be interested as he had already been through it. More specifically, appellant stated that in 1978 he had gone through a Veterans Administration (VA) program for drugs and alcohol, and upon return from completion of the VA program, he completed the agency's program at the Base. Without appellant's voluntary participation, the agency had no further obligation to pursue the matter of possible rehabilitation through the agency's Social Actions program.

The presiding official indicated in the initial decision that he did not reach appellant's contention on appeal that the agency had not considered his oral and written replies. The replies are referred to in the agency's Notice of Final Decision, dated September 21, 1981, as having been considered by the deciding official, who had received the oral reply from appellant and his representative. The summary of the

oral reply and the written reply were submitted to the Board's Regional Office as part of the agency's file in support of the action. Thus, we find that the agency considered appellant's replies, and that the appellant has not established the affirmative defense of harmful agency procedural error by a preponderance of the evidence.

In light of the foregoing, the Board finds that the agency has supported the removal action by a preponderance of the evidence, that the removal penalty is not disproportionate to the offense and past disciplinary record, and that the action promotes the efficiency of the service.

Accordingly, the initial decision dated January 27, 1982, is hereby REVERSED and the agency's removal action is SUSTAINED.

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

The appellant is hereby notified of the right under 5 U.S.C. § 7703 to seek judicial review of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be received by the court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

1 7 AUG 1984
(Date)

Washington, D.C.

Paula A. Latshaw

PAULA A. LATSHAW
ACTING SECRETARY